

# STATEMENT OF SCOPE

## Department of Health Services

### (DHS)

**Rule No.:** DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code)

**Relating to:** Restaurants

#### **1. Description of the objective of the rule:**

The primary objective of this rule revision is to amend ch. DHS 196 Appendix, “Wisconsin Food Code,” to conform to the 2013 FDA model Food Code and with policies and procedures used by both the Department of Health Services (DHS) and the Department of Agriculture, Trade and Consumer Protection (DATCP) in current food safety practice, and to reflect additional modifications proposed by the National Conference on Food Protection (NCFP). This rule revision will also identify approaches for consolidating DHS 196 and DHS 196 Appendix with DATCP’s chs. ATCP 75 (Retail Food Establishments) and ATCP 75 Appendix (Wisconsin Food Code).

This proposed consolidation of these chapters in the administrative code is part of a mandated initiative to transfer food safety and recreational licensing regulations from DHS to DATCP. 2015 Wisconsin Act 55 authorized the transfer of DHS’s Food Safety and Recreational Licensing Section to DATCP’s Division of Food Safety, effective July 1, 2016. As part of that consolidation, DHS 196 will be renumbered as subch. III of ch. ATCP 75 on the effective date of the transfer. Since both DATCP and DHS adopt identical versions of the Wisconsin Food Code, only one version of the amended Wisconsin Food Code, will continue to be adopted as an appendix to the amended version of ch. ATCP 75, after the effective date of the transfer.

DHS will work cooperatively with DATCP to establish a Food Code Advisory Committee consisting of stakeholders to provide advice on the content of rule amendments and best approaches for consolidating rules. Adopting this scope statement will allow DHS and DATCP to begin work amending chs. DHS 196 and DHS 196 Appendix and identifying approaches for consolidating portions of ch. DHS 196 in ch. ATCP 75 in preparation for the upcoming consolidation.

To avoid delay in creating an updated food code, reconciling the food codes and providing more efficient service to the regulated community the rulemaking process will begin with this statement of scope from DHS and will continue and be completed by DATCP so that a rule will be in effect as soon after the transfer date as possible.

**2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:**

History and Background. Under current law, DHS and DATCP divide regulatory authority over food safety. Under ch. DHS 196, DHS regulates food safety in restaurants. Under ch. ATCP 75, DATCP regulates food safety in retail food establishments such as grocery stores, supermarkets and most convenience stores. 2015 Wisconsin Act 55 transfers regulatory authority over food safety in restaurants from DHS to DATCP on July 1, 2016. From a regulatory perspective, restaurants will be categorized a type of retail food establishment.

The federal Model Food Code is fully updated every four years to provide practical, science-based guidance and enforceable provisions for mitigating risk factors known to cause foodborne illness. The 2013 federal Model Food Code is the most recent full edition published by the FDA. However, the current Wisconsin Food Code, appended to ch. ATCP 75 for retail food establishments and to ch. DHS 196 for restaurants, is based on the 2009 version of the federal Model Food Code.

Consolidation with DATCP Division of Food Safety. The transfer of DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety will improve services for Wisconsin's food and recreational industries. It will create a "one-stop" contact point for restaurants and retail food establishments, making it easier to quickly get licensing and other regulatory information. Most significantly for this proposed rule revision, it will continue consistent oversight of restaurants and other retail food establishments in Wisconsin. Both restaurants and retail food establishments (grocery stores, etc.) are regulated under the same Wisconsin food code. Having one agency interpret the Wisconsin Food Code using one set of regulations will encourage consistency. Amending DHS 196 Appendix, the Wisconsin Food Code, will ensure that stakeholders have a rule that is based on the updated guidance.

Proposed Policies. The proposed rule aims to revise the Wisconsin Food Code to incorporate changes in the 2013 federal Model Food Code, while retaining certain regulations that are unique to Wisconsin. This rule will ensure that the Wisconsin Food Code is in step with the latest model food safety regulations, which will reduce confusion and increase efficiency for concerned stakeholders in the retail food and restaurant industries.

The proposed rule will also explore approaches for reconciling any differences between chs. ATCP 75 and DHS 196 in order to facilitate the transfer of regulatory authority over food safety in restaurants from DHS to DATCP. On July 1, 2016, DHS 196 will be renumbered as subch. III as a replacement for the current subch. III of ch. ATCP 75. The consolidation will eliminate the need to publish two duplicative versions of the Wisconsin Food Code. Reconciling any differences between chs. ATCP 75 and DHS 196 will bring consistency to DATCP's rules and provide clarity to concerned parties in the retail food and

restaurant industries. Integrating ch. DHS 196 with ch. ATCP 75 may involve renumbering and amending provisions, repealing, or repealing and recreating, and combining provisions.

Related Rulemaking Activities. This scope statement is one of three scope statements prepared by DHS to facilitate the transfer of the Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety. The other scope statements are for chs. ATCP 192 and 198.

After July 1, 2016, regulatory authority for DHS 192 (Cities, Counties, and Villages Designated as Agents of the Department for Public Health) will be transferred to DATCP and DHS 192 will be renumbered as a newly created ATCP 74 (Local Agents and Regulation). At that time, subch. III of ATCP 75 (Local Regulation of Retail Food Establishments) will also become a subchapter of ATCP 74.

DHS has also prepared a scope statement for DHS 198 (Vending of Food). DHS 198 will be renumbered as a newly created subch. IV of ATCP 75 on July 1, 2016. DHS and DATCP staff will work with stakeholders to evaluate the content of DHS 198 and determine whether or how to streamline these regulations, transferring relevant provisions into ATCP 75 Appendix (Wisconsin Food Code) and eliminating any duplicative provisions.

In addition to the three scope statements prepared by DHS, DATCP has also prepared a scope statement for ATCP 75 and ATCP 75 Appendix to amend regulations related to retail food establishments and to consolidate DHS restaurant and vending regulations transferred to DATCP on July 1, 2016.

Policy Alternatives. Do nothing. If DHS and DATCP do nothing, then the Wisconsin Food Code will be out of step with the current federal Model Food Code. In addition, food business operators will have to meet requirements for sous vide processing and reduced oxygen packaging that are more onerous than those now accepted as sufficient for safety. The Wisconsin Food Code's provisions may no longer be based on the latest science and food customers may be protected less effectively and efficiently. Furthermore, if DHS and DATCP do not reconcile differences between chs. ATCP 75 and DHS 196 in light of the transfer of regulatory authority over food safety in restaurants, then concerned parties may be faced with conflicting rules across the range of retail food establishment activities. If DHS and DATCP do not begin identifying approaches for integrating rules that are scheduled to be transferred, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

### **3. Statutory authority for the rule (including the statutory citation and language):**

Statutory Authority: Sections 227.14 (1s) and 254.74 (1), Stats.

#### **227.14 Preparation of proposed rules.**

**(1s) Exception; preparation of certain rules based on federal food code.** Notwithstanding sub. (1), if the department of agriculture, trade and consumer protection or the department of health services prepares a proposed rule based on the model food code published by the federal food and drug administration, the proposed rule may be in the format of the model food code.

**254.74 Powers of the department and local health departments.**

(1) The department shall do all of the following: (a) Administer and enforce this subchapter, the rules promulgated under this subchapter and any other rules or laws relating to the public health and safety in hotels, tourist rooming houses, bed and breakfast establishments, restaurants, vending machine commissaries, vending machines and vending machine locations.

(am) Promulgate rules, in consultation with the department of safety and professional services, under which the department of health services shall conduct regular inspections of sealed combustion units, as required under s. 101.149 (5) (c), for carbon monoxide emissions in hotels, tourist rooming houses, and bed and breakfast establishments. The rules shall specify conditions under which it may issue orders as specified under s. 101.149 (8) (a). The rules may not require the department of health services to inspect sealed combustion units during the period in which the sealed combustion units are covered by a manufacturer's warranty against defects.

(b) Require hotels, tourist rooming houses, restaurants, vending machine operators and vending machine commissaries to file reports and information the department deems necessary.

(c) Ascertain and prescribe what alterations, improvements or other means or methods are necessary to protect the public health and safety on those premises.

(d) Prescribe rules and fix standards, including rules covering the general sanitation and cleanliness of premises regulated under this subchapter, the proper handling and storing of food on such premises, the construction and sanitary condition of the premises and equipment to be used and the location and servicing of equipment. The rules relating to the public health and safety in bed and breakfast establishments may not be stricter than is reasonable for the operation of a bed and breakfast establishment, shall be less stringent than rules relating to other establishments regulated by this subchapter and may not require 2nd exits for a bed and breakfast establishment on a floor above the first level.

**4. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:**

There is no federal law related to retail food establishments, including restaurants. The FDA publishes the federal Model Food Code as a model for states to use in developing its food safety regulations for retail food establishments.

**5. Description of all entities that may be impacted by the rule:**

This rule will revise regulations for restaurants currently licensed and inspected by DHS or its local city and county agents.

**6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:**

DHS estimates that it will use approximately 0.50 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. DHS will assign existing staff to develop this rule. DHS will work jointly with DATCP staff, who are separately proposing to revise ATCP 75 and ATCP 75 Appendix, to facilitate seamless consolidation of DHS 196 and ATCP 75.

**7. Anticipated economic impact**

The proposed rule is not expected to have any negative economic impact and will positively affect operators of food service operations, state and local food safety inspectors and public health. By adopting the most current practices in food safety, the proposed rule revision will ensure Wisconsin's food regulations reflect best practice for protecting public health. If adopted, the proposed rule will include less onerous provisions for sous vide processing and reduced oxygen packaging. As part of the larger initiative to consolidate and streamline Wisconsin's food safety programs, it will remove unnecessary duplication of regulations and ensure consistent interpretation of retail food regulations. It will make it easier for retail food establishment operators, including restaurant owners, to know who to contact for information with licensing and regulatory questions.

Both DATCP and DHS will work closely with stakeholders to ensure the rule revisions protect public health without imposing an undue economic burden. The rule will not raise fees.

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